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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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app

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1. This case involves "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The court of appeals believed it was compelled by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), to invalidate Congress's extension of Social Security taxes to sitting judges' salaries. It observed that the Court's subsequent decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), had seriously undermined the reasoning of *Evans*, but it could not conclude that *Evans* had been definitively overruled, and it therefore followed this Court's instructions to adhere to "a precedent of this Court [with] direct application in a case, [even if it] appears to rest on reasons rejected in some other line of decisions." Pet. App. 7a

(quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Respondents make little effort to argue that the invalidation of an Act of Congress is not sufficiently important to warrant this Court's review. Rather, they contend that the court of appeals' decision was correct under an application of *Evans*. See Br. in Opp. 12-18. But, as we have argued in our petition, it is *Evans* that is wrong and warrants reconsideration. The *rationale* of *Evans*, that Article III judges' salaries are per se immune from tax under an analogy to the intergovernmental tax immunity doctrine, has long since been disapproved. See Pet. 20; Br. in Opp. 15 n.9. What is left of *Evans*, under the court of appeals' interpretation of it, is merely a *result*—that income taxes may be imposed on the salaries of new judges, but not on the salaries of judges sitting when the taxes take effect. That result is not based on the reasoning that informed *Evans*, nor is it justified by any of this Court's subsequent decisions under the Judges' Compensation Clause.

Even if *Evans* could be read to support the rule adopted by the court of appeals, it would still warrant reconsideration. As Justices Holmes and Brandeis explained in that case, the core purpose of the Judges' Compensation Clause, to protect the independence of Article III judges from political pressure, is in no way threatened by requiring judges to pay taxes that the great majority of other citizens must pay as well. See 253 U.S. at 265 (dissenting opinion). "[J]udges are also citizens," and the Judges' Compensation Clause does not grant them an "immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are

charged with administering." *O'Malley*, 307 U.S. at 282.

Moreover, the court of appeals' resurrection and reinterpretation of *Evans* threaten to do considerable mischief. As we explain in our petition (at 23-25), the court of appeals' rule would grant judges immunity from increases in the *rate* of income tax as well as from the application of a new income tax. Respondents assert that this is unlikely to be true (Br. in Opp. 24), but they do not explain why there is any analytical difference between the two situations. If it is true, as respondents argue, that new taxes imposed on judges' salaries "diminish" their pre-tax "compensation," it is hard to see how an increase in the marginal income tax rate applicable to judges' salaries from (for example) 25% to 30% would not also be an unconstitutional diminution of their compensation.

Respondents point out that, apparently, no Article III judge in the past has thought to use this argument in an attack on increases in income tax rates. See Br. in Opp. 24. Under the regime of *Evans*, however, judges' salaries were wholly immune from income tax; increases in the income tax rate were therefore irrelevant to judges at the time. After the Court in *O'Malley* strongly disapproved *Evans*, the general understanding was that even sitting judges' salaries could be made subject to a new tax (and, *a fortiori*, to increases in the tax rate) without any constitutional difficulty.[1] But now that the court of appeals has

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[1] See Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308, 333 n.94 (1976): "In O'Malley v. Woodrough, * * * the Court repudiated both *Evans* and *Miles* and held that a non-

reinterpreted *Evans* to bar the imposition of new taxes on the salaries of sitting judges and only sitting judges, *Evans* may be used in the future to attack increases in income tax rates applicable to judges' salaries.

2. Respondents argue (Br. in Opp. 18-23) that Congress's extension of Social Security taxes to sitting judges discriminated against Article III judges, and therefore violated the Judges' Compensation Clause. The court of appeals did not address that argument, but the Court of Federal Claims correctly rejected it. The trial court pointed out that, by extending Social Security taxes to federal judges, Congress brought judges into parity with the great majority of the civilian labor force that was already covered by Social Security. See Pet. App. 28a-29a. It is difficult to see how such an action can be considered discriminatory. If it were, then Congress would be powerless ever to eliminate or reduce any momentary tax advantage granted to federal judges, even if that advantage itself were not constitutionally compelled.

Respondents further argue that Congress discriminated against federal judges because it permitted other federal employees and officers, who had previously been covered by the Civil Service Retirement System (CSRS), to choose between coverage by CSRS and Social Security, but did not also permit judges to opt out of Social Security coverage and thereby avoid the old-age, survivors, and disability

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discriminatory general income tax may be applied to federal judges without diminishing judicial compensation within the meaning of the compensation clause."

insurance (OASDI) portion of Social Security taxes.[2] Br. in Opp. 18-22. Those other federal employees and officers were not similarly situated to federal judges, however. Unlike federal judges, who may retire on full salary without having made any financial contribution at all towards that annuity (see 28 U.S.C. 371(a)), other federal employees and officers covered by CSRS were (and are) required to pay something towards their retirement annuities. Under the CSRS system, seven percent of the basic pay of most federal employees is deducted to finance their retirement annuities. See 5 U.S.C. 8334(a)(1).[3]

Congress allowed some federal employees to "opt out" of Social Security, but it did so only if those employees participated in the CSRS program. Thus, Congress gave some federal employees the choice between two retirement programs, both of which require salary contributions. Congress also exempted those federal employees who elected to remain in CSRS from OASDI taxes, because otherwise those employees would be subject to a double deduction (for Social Security and for CSRS). But Congress had no occasion to give federal judges a similar election, since federal judges' full-salary retirement annuity requires no financial contribution from judges with

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[2] Respondents do not suggest that this argument applies to the hospital insurance (Medicare) portion of Social Security taxes.

[3] That percentage was, in fact, greater than the 5.7% Social Security OASDI tax on employees' wages in effect in 1983 and applied to judges' salaries at the time. See Lynn Dec. ¶ 20, C.A. App. 113. The Social Security OASDI tax rate applicable to employees' wages is currently 6.2%. See 26 U.S.C. 3101(a). Thus, the Social Security tax rate applicable to judges' salaries is less than the mandatory contribution to CSRS.

sufficient years of service, but is financed out of general tax revenues.

3. On the disqualification issue, respondents agree with us that any judges' claims arising before 1990 are now barred by the statute of limitations (Br. in Opp. 25-26). They argue, however, that judges may have a claim for diminution in compensation that occurred after 1990, and that our suggestion to the contrary is based on reasoning that was necessarily rejected in *United States* v. *Will*, 449 U.S. 200 (1980). That contention is incorrect.

Will involved challenges to alleged separate reductions, in four different years, in the statutory salaries of federal judges. The Court held that the salaries had in fact been reduced in the first and fourth of those years, and that those reductions violated the Judges' Compensation Clause. In so holding, the Court implicitly concluded that an increase in judges' salaries could not retroactively "cure" a previous unconstitutional diminution in those salaries. We do not suggest otherwise; in particular, we do not suggest (as respondents appear to believe) that any unconstitutional "diminution" in compensation that occurred when Congress first extended Social Security taxes to judges' salaries could have been retroactively cured when Congress later raised those salaries. Rather, we suggest that the financial harm attributable to any such "diminution" came to an end, because of the subsequent, substantial increase in judges' salaries, well before April, 1990. See Pet. 26 n.12.

Respondents also dismiss as "contingent and speculative" (Br. in Opp. 29) the possibility that Congress may raise income tax rates in the future. While Congress's future plans for the income tax obviously

cannot be known now, it is surely not speculative to suggest that Congress may find it necessary in the future to raise the income tax rate or to reduce the extent of deductions and credits available to reduce income tax. Under the court of appeals' reading of *Evans*, those adjustments would violate the Judges' Compensation Clause, and every federal judge's salary would likely be affected by them. The Rule of Necessity therefore permits this Court to hear and decide this case. See *Will*, 449 U.S. at 217.

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For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
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